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Stroz Friedberg, LLC

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

WAYMO LLC,

Plaintiff,

V.

UBER TECHNOLOGIES, INC.;
OTTOMOTTO LLC; OTTO
TRUCKING LLC,

Defendants.

CASE NO. 3:17-cv-00939-WHA

**STROZ FRIEDBERG, LLC'S RESPONSE
TO ORDER TO SHOW CAUSE (DKT. 795)**

Courtroom: 8 - 19th Floor
Judge: Hon. William Alsup
Hearing: August 16, 2017
Time: 8:00 a.m.

1 Stroz Friedberg, LLC (“Stroz”), by and through its undersigned counsel, respectfully submits
 2 the following response to the Order to Show Cause (Dkt. 795).

3 **INTRODUCTION**

4 Written agreements entered into by Stroz as a condition of its engagement by Uber
 5 Technologies, LLC (“Uber”) and Ottomotto LLC (“Otto”) require Stroz to treat all information
 6 received by Stroz during the course of that engagement as protected by the attorney-client privilege,
 7 attorney work product doctrine, and/or common interest doctrine. In furtherance of this treatment,
 8 Stroz is contractually obligated not to disclose any information, documents, and things it may have
 9 received from Anthony Levandowski during the course of its investigation, unless Mr. Levandowski
 10 consents.

11 Mr. Levandowski has not consented. Indeed, Mr. Levandowski has made clear his belief that
 12 disclosure of any such information documents and things “would violate Mr. Levandowski’s Fifth
 13 Amendment rights and his attorney-client and common interest privileges.”

14 Rather than breach the terms of its engagement, and in light of Mr. Levandowski’s assertions
 15 of his Fifth Amendment rights and attorney-client and common interest privileges, Stroz has not to
 16 date produced any documents and things within its possession, custody, or control that are responsive
 17 to Waymo’s subpoena. Stroz has, however, repeatedly made clear that in the event that either (a) Mr.
 18 Levandowski consents, or (b) a final non-appealable order is issued, Stroz will produce forthwith.

19 On the latter point, as this Court is aware, its order requiring Stroz to produce has been stayed
 20 by the United States Court of Appeals for the Federal Circuit.¹ Stroz remains ready to comply with
 21 this Court’s order in the event that the Federal Circuit lifts the stay, or that order is affirmed on appeal
 22 and not subsequently stayed by the Supreme Court.

23 **BACKGROUND**

24 On March 4, 2016, Stroz entered into an engagement letter (the “Uber Engagement Letter”)
 25 with Morrison & Foerster, on behalf of Uber, and O’Melveny & Myers, on behalf of Otto. (See

27 ¹ In Stroz’s view, production now would violate the Federal Circuit’s stay order and vitiate Mr.
 28 Levandowski’s assertions of his Fifth Amendment rights and attorney-client and common interest
 privileges.

1 Declaration of Eric M. Friedberg in Support of Response to Order to Show Cause (Dkt. 795)
 2 (“Friedberg Declaration”) ¶ 2.) On March 21, 2016, Stroz entered into a related agreement (the
 3 “Levandowski Letter”) with Donahue Fitzgerald LLP, on behalf of Anthony Levandowski. (*See id.*
 4 ¶¶ 3-4.)

5 These agreements set forth specific protocols by which Stroz would undertake and report the
 6 results of a factual investigation relating to documents and electronic media collected from, among
 7 others, Anthony Levandowski. (*See id.* ¶ 5.) Those protocols, which are detailed in Exhibit B of the
 8 accompanying Friedberg Declaration, describe the material to be collected by Stroz, the means by
 9 which the information was to be analyzed, the ways in which that information could be shared, and
 10 with whom, and the restrictions on Stroz’s ability to delete, transfer, or use those materials. (*See id.* ¶
 11 5, Ex. B at 3-5.)

12 Stroz also made certain commitments in these agreements to maintain the confidentiality of
 13 the documents and media collected as part of its investigation. In the Uber Engagement Letter, for
 14 example, Stroz agreed that it would “maintain as confidential all information and data it receives from
 15 Clients, Uber, Ottomotto (including its employees), and Messrs. Levandowski and Ron (including
 16 their respective counsel) (the ‘Confidential Information’), and not disclose any Confidential
 17 Information to any parties other than Clients, Uber, Ottomotto, or Messrs. Levandowski and Ron
 18 (including their respective counsel).” (*See id.* ¶ 6, Ex. A at 2-3.) In the Levandowski Letter, Stroz
 19 further agreed that it would use the information collected from Mr. Levandowski solely for the
 20 purposes of the investigation, and that it would “not disclose the [information], or any portion thereof,
 21 nor the contents of the [information], to any third party whatsoever, including without limitation its
 22 Clients, or any of them, or any law firm representing Uber USA, LLC or Ottomotto Inc., except as
 23 provided in the attached Examination Protocol.” (*See id.* ¶ 6, Ex. B at 2.)

24 On May 10, 2017, Plaintiff Waymo, LLC (“Waymo”) served a Subpoena to Produce
 25 Documents, Information, or Objections or to Permit Inspection of Premises in a Civil Action (the
 26 “Subpoena”) on Stroz, seeking the production of 31 categories of documents (the “Requests”). Stroz
 27 served its responses and objections to the Subpoena on June 7, 2017, explaining that it would produce
 28

1 any responsive materials if it received the required permissions, or upon a final non-appealable Court
 2 order.

3 On June 8, 2017, Waymo filed a motion to compel Stroz to produce documents in response to
 4 the Subpoena. (Dkt. 570.) On June 9, 2017, Uber, Otto, Otto Trucking, and Mr. Levandowski filed
 5 motions to quash Waymo's subpoena. (Dkts. 580, 581, 583.) On June 12, 2017, Stroz received
 6 correspondence from counsel for Uber and Otto stating, for the first time, that Uber and Otto consented
 7 to Stroz producing "any materials that [Stroz] gathered from Levandowski that may constitute or
 8 contain any Google information, or that might possibly contain or reference any Google information."
 9 (See Friedberg Decl., ¶ 8, Ex. C at 1-2.) Attached to the June 12 correspondence was a separate letter
 10 sent to Mr. Levandowski directing him to consent to Stroz's production of any downloaded materials
 11 in its possession. (See *id.*, Ex. C at 3.) That same day, however, Stroz received correspondence from
 12 counsel for Mr. Levandowski, stating that, notwithstanding Uber's direction, "Mr. Levandowski **does**
 13 **not consent** to this request and objects to the production of any materials or devices in Stroz'
 14 possession that may have been provided by Mr. Levandowski for review by Stroz Friedberg." (See
 15 *id.*, ¶ 9, Ex. D at 1.) Counsel further stated that "the requested production would not only violate the
 16 terms of the contractual commitment Stroz Friedberg made to Mr. Levandowski, but would be
 17 premature and risk undermining Mr. Levandowski's constitutional rights and attorney-client
 18 privileges, as well as violate his separate privacy interests, before the Court has an opportunity to
 19 resolve the important legal issues presented in the pending motion." (See *id.*, ¶ 9, Ex. D at 1.)

20 On June 13, 2017, Stroz filed its response to Waymo's motion to compel. (Dkt. 614.) Stroz
 21 made clear in its response that it would produce any responsive materials it had (other than materials
 22 protected from disclosure by Stroz's own attorney-client privilege), if Uber, Otto, and Mr.
 23 Levandowski consented. Stroz also make clear that it would comply with any final non-appealable
 24 court order requiring disclosure. Magistrate Judge Corley granted Waymo's motion to compel on
 25 June 21, 2017 and ordered Stroz to produce documents responsive to Request Nos. 1-21 and 28-31,
 26 and a privilege log, by June 27, 2017. (Dkt. 670 at 8-11.) On June 27, 2017, this Court entered an
 27 order denying the motions for relief from Magistrate Judge Corley's order but stayed that order until
 28 July 5 at noon to give Defendants and Mr. Levandowski an opportunity to appeal. (Dkt. 745.) On

1 June 29, 2017, Mr. Levandowski appealed the Court’s June 27 order to the United States Court of
 2 Appeals for the Federal Circuit and filed an accompanying emergency motion to stay that order
 3 pending the appeal. (Dkt. 765.) The same day, the Federal Circuit stayed the Court’s June 27 order
 4 pending its consideration of Mr. Levandowski’s and Waymo’s emergency motion to stay papers:
 5 “[t]he district court’s order requiring production of the records in question is temporarily stayed
 6 pending this court’s consideration of the motions papers.” (*Waymo LLC v. Uber Technologies, Inc.*,
 7 No. 17-2235 (Fed. Cir. June 29, 2017), Dkt. 4.)

8 On July 3, 2017, the Court entered the Order to Show Cause (Dkt. 795).

9 **DISCUSSION**

10 Stroz believes its actions are justified in light of its obligation to treat all information received
 11 during the course of its engagement as protected by the attorney-client privilege, attorney work product
 12 doctrine, and/or common interest doctrine, as well as its obligation not to disclose any information,
 13 documents, and things it may have received from Mr. Levandowski during the course of its work
 14 unless Mr. Levandowski consents. (See Friedberg Decl. ¶¶ 5-6, Ex. A at 2-3, Ex. B at 3-5.)

15 As the Court knows, Mr. Levandowski has made clear that he does not consent, and that he
 16 believes that production of any such materials by Stroz would violate his Fifth Amendment rights and
 17 his assertions of attorney-client privilege. In furtherance of his position, Mr. Levandowski has
 18 appealed the order granting Waymo’s motion to compel—which covers any materials addressed by
 19 this Court’s Order to Show Cause (*i.e.*, any originals and copies of any files that might be in Stroz’s
 20 possession that originated from Waymo)—to the Federal Circuit, which has stayed it. (*Waymo LLC*
 21 *v. Uber Technologies, Inc.*, No. 17-2235 (Fed. Cir. June 29, 2017), Dkt. 4.)

22 Stroz is mindful of this Court’s instruction in the Order to Show Cause that this filing should
 23 explain what controlling authority allows someone to knowingly receive and keep suspected stolen
 24 property despite a demand or order that it be returned to its rightful owner. Assuming for the purposes
 25 of argument that Stroz is in possession of information, documents, and/or things that are the property
 26 of Waymo, Stroz has been unable to identify any controlling authority addressing the issues raised in
 27 the Order to Show Cause under the facts presented in this case.

1 Stroz respectfully submits that it is in an impossible position—either honor its contractual
2 obligations and Mr. Levandowski's asserted Fifth Amendment rights and asserted attorney-client
3 privileges and attract the ire of this Court, or breach those obligations and ignore Mr. Levandowski's
4 asserted constitutional rights and privileges. Given the circumstances, Stroz believes that it has at all
5 times during this litigation acted appropriately.

6 DATED: July 12, 2017

KIRKLAND & ELLIS LLP

7 /s/ Robert B. Ellis

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16 Attorneys for
17 *Stroz Friedberg, LLC*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on July 12, 2017, a true and correct copy of the foregoing document is
3 being electronically filed with the Clerk of the United States District Court of the Northern District
4 of California by using the CM/ECF system, which will send notice of such filing to all counsel of
5 record.

6 DATED: July 12, 2017

7 KIRKLAND & ELLIS LLP

8 Respectfully submitted,

9 */s/ Robert B. Ellis*
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